

Demeter O&G Supplies Sdn Bhd v Datuk Stephen Duar Tuan Kiat (as judicial manager of Scomi Oiltools Sdn Bhd and Scomi KMC Sdn Bhd)

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT
NO WA-22NCC-276-06 OF 2021
ADLIN ABDUL MAJID JC
30 NOVEMBER 2021

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Civil Procedure — Striking out — Application for — Application to strike out action — Defendant applied to strike out plaintiff's claim — Plaintiff claimed amount outstanding from defendant — Whether plaintiff obtained leave to file action — Whether defendant as agent had disclaimed personal liability — Whether there was trust arrangement — Whether defendant owed duty of care to plaintiff

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This was an application by the defendant to strike out the plaintiff's claim ('the striking out application'). The plaintiff was in the business of supplying fluids and chemicals for the oil and gas industry. The defendant was the judicial manager of Scomi KMC Sdn Bhd ('SKMC') and Scomi Oiltools Sdn Bhd ('SOSB'), appointed by orders of the High Court. SKMC and SOSB were subsidiaries of Scomi Energy Services Sdn Bhd ('SESB'). SOSB handled the day-to-day operations of work contracted by SKMC. The plaintiff had been supplying drilling fluids and chemicals to SOSB since 2015, for projects handled by SOSB and/or SKMC. The plaintiff claimed that there was an amount outstanding to the plaintiff of RM810,101.38 for such supply ('the old debt'). The plaintiff, SKMC and SOSB also worked together on a project ('the Mubadala project'). SOSB issued letters to appoint the plaintiff as the purchasing representative of the Mubadala project ('the SOSB contract'). The plaintiff claimed that parties had agreed on the following: (a) all payments from the Mubadala project received by SKMC would be held for the benefit of SOSB and the plaintiff; (b) all monies received by SKMC would be transferred immediately and directly to SOSB and the plaintiff, and where there was excess, towards the old debt; and (c) all monies received would be channelled to a nominated account held by SKMC and SOSB ('the bank account'). Thus, the plaintiff claimed that a constructive trust had arisen, with SOSB and/or SKMC as trustees and the plaintiff as a beneficiary of the trust. The defendant on the other hand, contended that amounts in the bank account included not only proceeds received from the Mubadala project, but also from other SKMC and SOSB projects not involving the plaintiff. The plaintiff further claimed that it had supplied drilling fluids and chemicals for the Mubadala project amounting to RM12,313,948.31, but only received RM6,891,721.50. Amounts were

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A allegedly withdrawn from the bank account for purposes unrelated to the Mubadala project, and the defendant failed to pay the amount outstanding to the plaintiff. Thus the plaintiff claimed that the defendant breached the constructive trust and/or was negligent, in failing to make inquiries on and to give effect to the constructive trust and to ensure that amounts received in the bank account were disbursed to the plaintiff.

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Held, allowing the striking out application:

- C (1) In recent times, the courts had held that judicial managers were officers of the court as they were appointed by and were under the control and supervision of the court. Thus, leave was required to commence an action against the defendant as judicial manager and as an officer of the court. This was fatal to the plaintiff's action against the defendant (see paras 19, 22 & 25).
- D (2) The defendant had, by a letter dated 11 September 2020, informed the plaintiff of his appointment as judicial manager. He had also expressly disclaimed all personal liability pursuant to s 416 of the Companies Act 2016, in respect of all agreements entered into between SKMC, SOSB and the plaintiff. Thus, there was merit in the defendant's contention that the defendant could not be held liable under the terms of the SOSB contract, having disclaimed liability by way of the letter dated 11 September 2020 (see para 30).
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- F (3) No trust had been created between the plaintiff and SOSB and/or SKMC. The payment terms in the SOSB contract merely provided that payments were to be made on a back-to-back basis to the plaintiff. Thus, in the event that SOSB did not make payment, this would mean that an amount was due from SOSB to the plaintiff. The wordings in the clause could not in any way had led to the creation of a trust. Therefore, it was plain and obvious that the plaintiff's cause of action in relation to the trust claim against the defendant as judicial manager of SOSB and/or SKMC, could not stand (see paras 34–35 & 37).
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- H (4) The plaintiff had failed to plead any facts to establish that there was a duty of care owed by the defendant as a judicial manager to the plaintiff. Without establishing that a duty of care was owed to the plaintiff, it would consequently be impossible to establish that any alleged failure or refusal in taking certain actions amounted to negligence or had led to a breach of a duty of care. Since the existence of a duty of care had not been sufficiently pleaded by the plaintiff, the plaintiff had failed to establish a cause of action by the plaintiff against the defendant. Therefore this was a plain and obvious case for the claim to be struck out pursuant to O 18 r 19(1) of the Rules of Court 2012 (see paras 40 & 42).
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[Bahasa Malaysia summary]

Ini adalah permohonan oleh defendan untuk membatalkan tuntutan plaintif ('permohonan membatalkan'). Plaintif menjalankan perniagaan membekalkan cecair dan bahan kimia untuk industri minyak dan gas. Defendan ialah pengurus kehakiman Scomi KMC Sdn Bhd ('SKMC') dan Scomi Oiltools Sdn Bhd ('SOSB'), yang dilantik atas perintah Mahkamah Tinggi. SKMC dan SOSB adalah anak syarikat Scomi Energy Services Sdn Bhd ('SESB'). SOSB mengendalikan operasi harian kerja yang dikontrak oleh SKMC. Plaintif telah membekalkan cecair penggerudian dan bahan kimia kepada SOSB sejak 2015, untuk projek yang dikendalikan oleh SOSB dan/atau SKMC. Plaintif mendakwa terdapat jumlah tertunggak kepada plaintif sebanyak RM810,101.38 untuk bekalan tersebut ('hutang lama'). Plaintif, SKMC dan SOSB juga bekerjasama dalam satu projek ('projek Mubadala'). SOSB mengeluarkan surat untuk melantik plaintif sebagai wakil pembelian projek Mubadala ('kontrak SOSB'). Plaintif mendakwa bahawa pihak-pihak telah bersetuju dengan perkara berikut: (a) semua bayaran daripada projek Mubadala yang diterima oleh SKMC akan dipegang untuk kepentingan SOSB dan plaintif; (b) semua wang yang diterima oleh SKMC akan dipindahkan serta-merta dan terus kepada SOSB dan plaintif, dan jika terdapat lebih, kepada hutang lama; dan (c) semua wang yang diterima akan disalurkan ke akaun yang dinamakan yang dipegang oleh SKMC dan SOSB ('akaun bank'). Oleh itu, plaintif mendakwa bahawa amanah konstruktif telah berbangkit, dengan SOSB dan/atau SKMC sebagai pemegang amanah dan plaintif sebagai benefisiari amanah tersebut. Defendan sebaliknya berpendapat bahawa jumlah dalam akaun bank termasuk bukan sahaja hasil yang diterima daripada projek Mubadala, tetapi juga daripada projek SKMC dan SOSB lain yang tidak melibatkan plaintif. Plaintif seterusnya mendakwa pihaknya telah membekalkan cecair penggerudian dan bahan kimia untuk projek Mubadala berjumlah RM12,313,948.31, tetapi hanya menerima RM6,891,721.50. Sejumlah didakwa dikeluarkan daripada akaun bank untuk tujuan yang tidak berkaitan dengan projek Mubadala, dan defendan gagal membayar jumlah tertunggak kepada plaintif. Oleh itu, plaintif mendakwa bahawa defendan telah melanggar amanah konstruktif dan/atau cuai, kerana gagal membuat siasatan dan melaksanakan amanah konstruktif dan memastikan jumlah yang diterima dalam akaun bank telah dikeluarkan kepada plaintif.

Diputuskan, membenarkan permohonan pembatalan:

- (1) Pada masa ini, mahkamah-mahkamah telah memutuskan bahawa pengurus kehakiman adalah pegawai mahkamah kerana mereka dilantik oleh dan berada di bawah kawalan dan pengawasan mahkamah. Oleh itu, kebenaran diperlukan untuk memulakan tindakan terhadap defendan sebagai pengurus kehakiman dan sebagai pegawai mahkamah. Ini adalah fatal kepada tindakan plaintif terhadap defendan (lihat perenggan 19, 22 & 25).

- A (2) Defendan telah, melalui surat bertarikh 11 September 2020, memaklumkan plaintif tentang pelantikannya sebagai pengurus kehakiman. Dia juga secara jelas menafikan semua liabiliti peribadi menurut s 416 Akta Syarikat 2016, berkenaan dengan semua perjanjian yang dibuat antara SKMC, SOSB dan plaintif. Oleh itu, terdapat merit
- B dalam pertikaian defendan bahawa defendan tidak boleh dipertanggungjawabkan di bawah terma kontrak SOSB, setelah menafikan liabiliti melalui surat bertarikh 11 September 2020 (lihat perenggan 30).
- C (3) Tiada amanah telah diwujudkan antara plaintif dan SOSB dan/atau SKMC. Terma pembayaran dalam kontrak SOSB hanya menyatakan bahawa pembayaran hendaklah dibuat secara berterusan kepada plaintif. Oleh itu, sekiranya SOSB tidak membuat pembayaran, ini bermakna satu jumlah terhutang daripada SOSB kepada plaintif. Kata-kata dalam
- D klausa itu tidak boleh sama sekali telah membawa kepada penciptaan amanah. Oleh itu, adalah jelas dan nyata bahawa kausa tindakan plaintif berhubung dengan tuntutan amanah terhadap defendan sebagai pengurus kehakiman SOSB dan/atau SKMC, tidak dapat bertahan (lihat perenggan 34–35 & 37).
- E (4) Plaintif telah gagal untuk memplid apa-apa fakta untuk membuktikan bahawa terdapat kewajipan berjaga-jaga perlu diberi oleh defendan sebagai pengurus kehakiman kepada plaintif. Tanpa membuktikan
- F kewajipan berjaga-jaga perlu diberi kepada plaintif, akibatnya adalah mustahil untuk menentukan bahawa sebarang kegagalan atau keengganan yang dikatakan dalam mengambil tindakan tertentu adalah kecuaiian atau telah membawa kepada pelanggaran kewajipan berjaga-jaga. Memandangkan kewujudan kewajipan berjaga-jaga tidak cukup diplidkan oleh plaintif, plaintif telah gagal untuk membuktikan
- G kausa tindakan oleh plaintif terhadap defendan. Oleh itu, ini adalah kes yang jelas dan nyata untuk tuntutan itu dibatalkan menurut A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 40 & 42).]

Cases referred to

- H *Accolade Land Sdn Bhd v Mass Rapid Transit Corporation Sdn Bhd & Ors* [2017] MLJU 1868, HC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Bank Negara Malaysia v Co-operative Central Bank Ltd (Jaffnese Co-operative Society Ltd & Ors, intervenors) [1994] 1 MLJ 170, HC (refd)
- I *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204, CA (folld)
Chin Cheen Foh v Ong Tee Chew [2003] 3 MLJ 57, HC (folld)
Co-operative Central Bank Ltd (in receivership) & Ors v The Industrial Court of Malaysia & Ors [1994] 2 MLJ 285, HC (folld)

- Jepak Holdings Sdn Bhd v TNB Repair and Maintenance Sdn Bhd & Ors* [2021] 11 MLJ 625, HC (refd) **A**
- Kyrris v Oldham and others; Royle v Oldham and others* [2003] EWCA Civ 1506, CA (refd)
- Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473, HC (refd) **B**
- Maidstone Palace of Varieties, Limited Blair v Maidstone Palace of Varieties, Limited, In re* [1909] 2 Ch 283, Ch D (refd)
- Monday-Off Development Sdn Bhd v Bumimetro Construction Sdn Bhd & Ors* [2021] MLJU 915, HC (refd)
- SKM&E Bersekutu Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd (in creditors' voluntary liquidation) and another appeal* [2019] 3 MLJ 281, FC (folld) **C**
- See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [2010] 1 MLJ 547, HC (refd)
- Swiber Holdings Ltd, Re* [2018] 5 SLR 1358, HC (refd)
- TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567, HC (refd) **D**
- Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors* [1995] 1 MLJ 1, SC (folld)
- Top Builders Capital Bhd & Ors, Re* [2021] 10 MLJ 327, HC (refd) **E**
- Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614, SC (folld)
- Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233, SC (refd) **F**

Legislation referred to

- Companies Act 2016 ss 414, 414(3)(a), 416, 416(1)(a), (1)(b), (2), 421, 423, 429
- Rules of Court 2012 O 18 r 19(1), 19(1)(a), (1)(b), (1)(d) **G**

- K Selva Kumaran (Yau Jie Luan with him) (Rose Hussin) for the plaintiff.*
- Lee Shih (Pang Huey Lynn with him) (Lim Chee Wee Partnership) for the defendant.*

Adlin Abdul Majid JC:

INTRODUCTION

- [1] The defendant filed an application by way of encl 5 to strike out the plaintiff's claim ('striking out application'). I allowed the striking out application, and provided brief reasons for my decision. These are the full grounds of my decision. **I**

A BACKGROUND FACTS

[2] The plaintiff is in the business of supplying fluids and chemicals for the oil and gas industry.

B [3] The defendant is the judicial manager of Scomi KMC Sdn Bhd ('SKMC') and Scomi Oiltools Sdn Bhd ('SOSB'), appointed by orders of the High Court dated 14 August 2020, and extended pursuant to orders dated 9 February 2021.

C [4] SKMC and SOSB are subsidiaries of Scomi Energy Services Sdn Bhd ('SESB'). SOSB handles the day-to-day operations of work contracted by SKMC.

D [5] The plaintiff had been supplying drilling fluids and chemicals to SOSB since 2015, for projects handled by SOSB and/or SKMC. The plaintiff claimed that there is an amount outstanding to the plaintiff of RM810,101.38 for such supply ('old debt').

E [6] The plaintiff, SKMC and SOSB also worked together on a project involving MDC Oil & Gas (SKC 320) Ltd ('Mubadala project'). SOSB issued letters dated 18 April 2020 and 27 April 2020 to appoint the plaintiff as the purchasing representative of the Mubadala project ('SOSB contract').

F [7] The plaintiff claimed that parties had agreed on the following:

(a) all payments from the Mubadala project received by SKMC will be held for the benefit of SOSB and the plaintiff;

G (b) all monies received by SKMC will be transferred immediately and directly to SOSB (for its share) and the plaintiff (for its share), and where there is excess, towards the old debt; and

(c) all monies received will be channelled to a nominated account held by SKMC and SOSB ('bank account'). Signatories to the bank account

H include the plaintiff's nominees.

[8] Thus, the plaintiff claimed that a constructive trust had arisen, with SOSB and/or SKMC as trustees and the plaintiff as a beneficiary of the trust. The defendant on the other hand, contended that amounts in the bank account include not only proceeds received from the Mubadala project, but

I also from other SKMC and SOSB projects not involving the plaintiff.

[9] The plaintiff further claimed that it had supplied drilling fluids and chemicals for the Mubadala project amounting to RM12,313,948.31, but only

received RM6,891,721.50. The amount outstanding due to the plaintiff is claimed to be RM5,422,226.81. In this regard, the plaintiff had copied correspondences related to the payment arrangements for the Mubadala project to the defendant, but the defendant had failed to respond to the plaintiff in writing. Instead, the defendant had changed the signatories of the bank account without the consent of the plaintiff, in breach of the constructive trust. Amounts were allegedly withdrawn from the bank accounts for purposes unrelated to the Mubadala project, and the defendant failed to pay the amount outstanding to the plaintiff.

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[10] Thus the plaintiff claimed that the defendant breached the constructive trust and/or was negligent, in failing to make inquiries on and to give effect to the constructive trust and to ensure that amounts received in the bank account were disbursed to the plaintiff. The plaintiff further claimed that the defendant is personally liable for the plaintiff's loss. The plaintiff claimed RM810,101.38 for the old debt, and RM5,422,226.81 for the amounts outstanding for the Mubadala project, from the defendant.

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[11] The defendant's key defences are as follows:

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- (a) the plaintiff's claim against SOSB is a claim for unsecured debt. The appropriate forum for the plaintiff to bring its claim is under the statutory procedure provided for under the judicial management regime, which is to file a proof of debt. This has been done by the plaintiff;
- (b) the defendant as judicial manager had disclaimed personal liability pursuant to s 416(2) of the Companies Act 2016 ('the CA');
- (c) changes to the signatories to the bank account were made pursuant to the defendant's powers as judicial manager;
- (d) there is no arrangement giving rise to a constructive trust;
- (e) the defendant as judicial manager does not owe any duty of care to the plaintiff, and cannot be held to be negligent against the plaintiff; and
- (f) this suit has been filed against a judicial manager who is an officer of the court, without leave of court.

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THE STRIKING OUT APPLICATION

The law on striking out

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[12] The defendant filed the striking out application pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012. The relevant provision reads:

- A** (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
- (a) it discloses no reasonable cause of action or defence, as the case may be;
- B** (b) it is scandalous, frivolous or vexatious;
- (c) ...
- (d) it is otherwise an abuse of the process of the Court,
- C** and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

- D** [13] In opposing the striking out application, the plaintiff relied on *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. Learned counsel for the plaintiff reminded the court that the summary procedure of striking out should only be exercised in plain and obvious cases, and where it can be clearly seen that a claim or answer is on the face of it obviously unsustainable.

Grounds for the striking out application

- E** [14] With this apt reminder, the court will consider each ground relied on by the defendant in the striking out application, and will assess whether the plaintiff's claim is on the face of it obviously unsustainable. The defendant relied on the following grounds:
- F** (a) the plaintiff had not obtained leave from the judicial management court to file this action against the defendant;
- (b) the defendant is statutorily an agent of SOSB and he had disclaimed personal liability under s 416(2) of the CA 2016;
- G** (c) there is no trust arrangement to form the basis of the defendant's alleged breach of constructive trust; and
- (d) the defendant does not owe a duty of care to the plaintiff and therefore cannot be in breach of the duty of care.

- H** Ground 1: The plaintiff had not obtained leave to file this action

- I** [15] This defendant's first argument is that the plaintiff must obtain leave from the judicial management court to file this action against the defendant, as the defendant is an officer of the court.

[16] Thus, the first issue that the court must address is whether a judicial manager is an officer of the court. Learned counsel for the plaintiff, Mr K Selva Kumaran, argued that a judicial manager is not an officer of the court. He

distinguished the roles of liquidator, who he claimed is an officer of the court, and a judicial manager, who he claimed to be an officer of the company.

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[17] On this, Mr Selva Kumaran relied on ss 414, 421 and 423 of the CA 2016. Section 414 provides for the powers and duties of the judicial manager, which includes the duty to ‘... do all such things as may be necessary for the management of the affairs, business and property of the company ...’ (s 414(3)(a)). Sections 421 and 423 then provide that the judicial manager is duty-bound to manage the affairs of the company in accordance with the proposal approved by 75% of the creditors of the company whose claims have been accepted by the judicial manager. Mr Selva Kumaran also referred to *Re Top Builders Capital Bhd & Ors* [2021] 10 MLJ 327, and highlighted the distinction made in this case between the roles of a liquidator and that of a judicial manager.

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[18] With due respect to Mr Selva Kumaran, nothing in any of the provisions nor in the case that he referred to could lead to the conclusion that a judicial manager is not an officer of the court. It is undisputed that the roles of a liquidator and a judicial manager are different, as the circumstances leading to their appointments differ. A liquidator’s duties arise in the winding up of a company, while a judicial manager’s duties arise pursuant to a judicial management order which is intended to rehabilitate companies in financial distress and to reduce cases of winding up (see *Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd and another suit* [2019] 8 MLJ 473).

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[19] Further, in recent times, the courts have held that judicial managers are officers of the court as they are appointed by and are under the control and supervision of the court (see *Leadmont Development, Jepak Holdings Sdn Bhd v TNB Repair and Maintenance Sdn Bhd & Ors* [2021] 11 MLJ 625 and *Monday-Off Development Sdn Bhd v Bumimetro Construction Sdn Bhd & Ors* [2021] MLJU 915).

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[20] Having established that the defendant, a judicial manager, is an officer of the court, I will now move on to the question of whether leave is required for action to be taken against him. There have not been any actions thus far filed against judicial managers personally. Thus, case laws applicable to other officers of the court, namely court-appointed liquidators or receivers, are instructive. In *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233, the Supreme Court held, at p 241, that leave from the court is required to sue the appellants, being court-appointed receivers, as they are officers of the court:

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... But the important point in this case was that as the appellants are officers of the court, leave of the court should have been obtained to proceed against them in the second originating summons and the case of *Re Maidstone Palace of Varieties Ltd* was

A correctly cited by counsel for the appellants in support of his submission that leave of the court was necessary ... (Emphasis added.)

B [21] The English High Court decision referred to in *Zainal Abidin Putih, In re Maidstone Palace of Varieties, Limited Blair v Maidstone Palace of Varieties, Limited* [1909] 2 Ch 283 held that no one has the right to sue an officer in another court without the permission of the court:

C ... the Court will deal with itself, and that *it will not allow its officer to be subject to an action in another Court with reference to his conduct in the discharge of the duties of his office*, whether right or wrong. The proper remedy for any one aggrieved by his conduct is to apply to this Court in the action in which he was appointed. *If any wrong has been done by the officer, the Court will no doubt see that justice is done, but no one has a right to sue such an officer in another Court without the sanction of this Court ...* (Emphasis added.)

D [22] Learned counsel for the defendant, Mr Lee Shih, explained the rationale for the requirement that leave must be obtained before an action is filed against an officer of the court. The reason behind this requirement, he submitted, is to ensure that officers of the court are protected from spurious, vexatious and frivolous litigation (see *Bank Negara Malaysia v Co-operative Central Bank Ltd (Jaffnese Co-operative Society Ltd & Ors, intervenors)* [1994] 1 MLJ 170, *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567 and *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [2010] 1 MLJ 547). The court is of the view that the reasoning in these cases, which relate to court-appointed receivers and liquidators, would also apply to judicial managers, as they are appointed by the court to fulfil the statutory purposes of judicial management. Thus, the court holds that leave is required to commence an action against the defendant as judicial manager and as an officer of the court.

G [23] Failure to obtain leave is fatal. The court struck out the claim in *Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow* [1995] 3 MLJ 204 as leave to sue the liquidator had not been obtained. In *Chin Cheen Foh v Ong Tee Chew* [2003] 3 MLJ 57, Abdul Malik Ishak J (as His Lordship then was) held that failure to obtain leave ‘... was certainly wrong in procedure and this court would not condone such laxity’.

I [24] The courts in *Co-operative Central Bank Ltd (in receivership) & Ors v The Industrial Court of Malaysia & Ors* [1994] 2 MLJ 285 and *Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors* [1995] 1 MLJ 1 held further that not only are proceedings against officers of the court that are instituted without leave liable to be dismissed, they also amount to contempt of court.

[25] Thus, guided by the authorities set out above, the court finds firstly, that the defendant, in his capacity as a judicial manager is an officer of the court. Secondly, being an officer of the court, leave is required to commence an action against him. In this case, it is undisputed that leave was not obtained by the plaintiff before commencing this action against the defendant. This is fatal to the plaintiff's action against the defendant.

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Ground 2: The defendant is an agent of SOSB and had disclaimed personal liability

[26] The next ground relied on by the defendant in the striking out application is that the judicial manager is statutorily an agent of SOSB. On this, s 416 of the CA 2016 on 'Agency and Liability for Contracts' is relevant. The section provides that:

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(1) The judicial manager or interim judicial manager of a company —

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- (a) shall be deemed to be the *agent of the company*;
- (b) shall be personally liable on any contract, including any contract of employment, entered into or adopted by him in the carrying out of his functions, *except in so far as the contract or a notice under subsection (2) otherwise provides*; and
- (c) shall be entitled to be indemnified in respect of that liability, and to have his remuneration and expenses defrayed, out of the property of the company which is in his custody or under his control in priority to all other debts except those subject to a security to which subsection 415(2) applies.

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(2) Where a contract entered into by the company is adopted by the judicial manager or interim judicial manager, *he may, by notice given to the other party, disclaim any personal liability under the contract.* (Emphasis added.)

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[27] The basis of this claim is monies due under the SOSB contract. Section 416(1)(a) of the CA 2016 provides that the judicial manager is an agent of the company. Since the defendant as the judicial manager is the agent SOSB, the right party for the plaintiff to sue is the principal in the transaction, namely SOSB, and not the defendant.

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[28] Further, under s 416(1)(b) and 416(2) of the CA 2016, the judicial manager can only be held personally liable if he does not disclaim liability pursuant to s 416(2) of the CA 2016. Section 416(2) specifically provides that the judicial manager may by notice, disclaim personal liability under a contract.

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[29] The Singapore High Court in *Re Swiber Holdings Ltd* [2018] 5 SLR

A 1358 found that a disclaimer by way of a letter was sufficient notification for disclaimer of personal liability.

B [30] It is not disputed that the defendant had, by a letter dated 11 September 2020, informed the plaintiff of his appointment as judicial manager. In the letter, he had also expressly disclaimed all personal liability pursuant to s 416 of the CA 2016, in respect of all agreements entered into between SKMC, SOSB and the plaintiff. Thus, the court finds that there is merit in the defendant's contention that the defendant cannot be held liable under the terms of the SOSB contract, having disclaimed liability by way of the letter dated 11 September 2020.

Ground 3: There is no trust arrangement

D [31] The next ground raised by the defendant is related to the plaintiff's cause of action based on an alleged breach of trust. The defendant argued that there is no trust arrangement to form the basis of the defendant's alleged breach of constructive trust.

E [32] The defendant relied on *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614, where it was held that there are three certainties that must exist for there to be a valid trust, namely certainty of words, certainty of subject and certainty of object.

F [33] In the context of a trust arising out of a contract, where there were retention sums, the position taken by the Federal Court in *SK M&E Bersekutu Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd (in creditors' voluntary liquidation) and another appeal* [2019] 3 MLJ 281 is of guidance. The Federal Court held as follows:

G [35] Having read the judgment of the Court of Appeal in these appeals, we are inclined to agree with the reasons given therein. We find that the approach is generally consistent with the English approach. As elucidated above, English authorities require that *if retention monies are to be impressed with trust the contract should identify by clear wordings that the retention monies are held in trust and for the trust fund to be established before the insolvency*. Such approach would appear to be consistent as seen from the decisions in *Rayack Construction Ltd v Lampeter Meat Co Ltd* which was followed in both *Wates Construction (London) Ltd v Franthom Property Ltd* and *Mac-Jordan Construction Limited v Brookmount Erostin Ltd*. While it may appear that the English approach is strict, it is still preferable for it tempers the risk of uncertainty and the likely competing claims that would ensue if the Qimonda approach is adopted. It also avoid the undesirability of not applying the assets in the hands of liquidators *pari passu* (except where monies are clearly identified as trust monies relating to a trust fund established before the insolvency of the employer) (see: Dennys, Nicholas and Robert Clay, *Hudson's Building and Engineering Contracts*, op cit para [5-068] at p 699).

...

[39] Besides the contractual provisions of cl 16.3 and the Appendix of the Conditions of subcontract reproduced hereinabove, *there is no express provision specifically requiring the retention sums in Appeal No 130 and Appeal No 131 to be held on trust with the employer as the fiduciary.*

[40] *There was also no clause mandating that the retention monies were to be kept separate from the assets of the respondent.* The contract between the appellants and the respondent did not prohibit the mixing of the monies of the respondent with the retention monies. (Emphasis added.)

[34] Guided by the authorities above, I am of the considered view that no trust had been created between the plaintiff and SOSB and/or SKMC. It is essential to note that the payment terms in the SOSB contract provides as follows:

A. Payment Term.

1. Payment will be made to Demeter on a back to back basis, immediately on receipt of funds from our client, Mubadala, latest within 45 days of Demeter delivering the goods to Scomi or else Demeter reserves the right to charge interest at the rate of CIMB's BFR plus 1.5% p.a. on all outstanding amount.

[35] The clause merely provides that payments are to be made on a back-to-back basis to the plaintiff. Thus, in the event that SOSB does not make payment, this would mean that an amount is due from SOSB to the plaintiff. The wordings in the clause could not in any way have led to the creation of a trust.

[36] Further, the plaintiff itself clearly took the position that the amount outstanding is a debt due from SOSB to the plaintiff, and filed its proof of debt form dated 8 October 2020, as a creditor who is owed an unsecured debt.

[37] Therefore, it is plain and obvious that the plaintiff's cause of action in relation to the trust claim against the defendant as judicial manager of SOSB and/or SKMC, cannot stand.

Ground 4: The defendant does not owe a duty of care to the plaintiff

[38] The final ground raised by the defendant is related to the plaintiff's cause of action based on negligence. The defendant contended that the plaintiff had not pleaded the necessary elements of any duty of care owed by the defendant as a judicial manager to the plaintiff, how there was a breach of such duty of care, and how this breach of duty of care caused damage to the plaintiff.

A [39] It is therefore necessary to consider the plaintiff's statement of claim and assess the references made to the alleged duty of care of the defendant and the breach of that duty, as claimed by the plaintiff. The plaintiff made reference to the defendant's negligence and breach of duty of care in the following paragraphs of the statement of claim:

B (a) para 26:

The Plaintiff pleads that the Defendant as JM of SKMC and/or SOSB had breached the trust and/or was negligent when:-

C (b) He failed, refused or neglected to make due inquiry in relation to why there was a third party signatory for the said Account;

(c) Due to his failure, neglect or refusal as stated above, the Defendant failed to ensure that he gave effect to the constructive trust stated above and ensure that the monies received in the said Account was only disbursed to the Plaintiff and SOSB according to their lawful portions;

D (d) Therefore the Defendant is liable personally for the said breach of trust and/or negligence.

(a) para 27:

E The Defendant as a licensed liquidator and serving as a JM should have made a full investigation in relation to the said Account before making any withdrawals from the said Account for any other use. The Plaintiff believes that the Defendant has used the monies in the said Account for matters unrelated to the Mubadala project.

F (b) para 28:

Arising from the breach of the constructive trust and/or his negligence, the Plaintiff has suffered a loss of RM5,422,226.81 for the Mubadala project and RM810,101.38 for the Old Debts.

G [40] From the statement of claim, it appears to the court that the plaintiff has failed to plead any facts to establish that there was a duty of care owed by the defendant as a judicial manager to the plaintiff. Without establishing that a duty of care was owed to the plaintiff, it would consequently be impossible to establish that any alleged failure or refusal in taking certain actions amounted to negligence or had led to a breach of a duty of care.

H [41] On this issue, the High Court decision of *Accolade Land Sdn Bhd v Mass Rapid Transit Corporation Sdn Bhd & Ors* [2017] MLJU 1868 is relevant. Lee Swee Seng J (as His Lordship then was), allowed the defendant's application to strike out the plaintiff's claim for failing to specify with precision how the duty of care arose. His Lordship held as follows:

I [96] We are here not dealing with a run-by-mill claim for negligence as in a running-down case or a professional negligence case where the law has accepted that

there is a duty of care owed. *Absent that the law requires the basis on which the tortious duty of care arose to be pleaded and the content of the said duty.*

[97] *The requirement to plead the basis of which the duty of care arose was exemplified in Selangor United Rubber Estates Ltd v Cradock & Ors* [1964] 3 All ER 709 at p 712 as follows:

... It seems to me that, *where a plaintiff alleges the breach of a duty arising from any given relation, it must be incumbent on the plaintiff to specify, and specify with precision, what is the relation from which the duty arises.* By 'relation' I mean, for example, to take a different case from the present, the relation of principal and agent with or without some special provisions. Once the relation is specified, no doubt the duties arising out of it are, in great part at least, matters of law, but the relation itself must, it seems to me, be specified with precision. Then should the plaintiff in this case specify that relation with precision before the delivery of defence? There is no general rule to be laid down in these matters, but at first sight one would think that, *where a plaintiff alleges that the defendant is in breach of duty, he ought to specify at the very start the relation under which the duty arises in order that the defendant may set his course accordingly; and at any rate in very many cases it must be embarrassing to the defendant to plead to an allegation of breach of duty without having the relation under which the duty arises precisely specified. In the present case that seems to me to be so ...* (Emphasis added.)

[98] Likewise in *Bullen & Leake & Jacob's Precedents of Pleadings* (2016) (18th Ed) at p 677 it was observed as follows:

It is not sufficient to assert that a duty of care is owed. The basis for the existence of a duty of care must be pleaded (eg the existence of a retainer or facts showing an assumption of responsibility towards the claimant) ... (Emphasis added.)

[99] My attention was also drawn by learned counsel for D1 to the case of *Yong Sze Hong v Pan Ka General Agencies Sdn Bhd* [1993] MLJU 95; [1994] 1 CLJ 555 at p 558 as follows:

... Furthermore, if counsel had solely relied on the tort of negligence, I would also have grave doubt if the action as pleaded could be sustained. It is elementary that the essential elements of actionable negligence are:

1. the existence of a duty to take care owing to the plaintiff by the defendant; 2. failure to attain that standard of care prescribed by the law; and 3. damage suffered by the plaintiff, which is causally connected with the breach of duty to take care.

The statement of claim should state the facts, upon which the supposed duty is founded, the duty to the plaintiff and the breach of such duty with which the defendant is charged. See *Gautret v Egerton* [1867] LR 2 CP 371 approved by Lord Alverstone CJ in *West Rand Central Gold Mining Co v R* [1905] 2 KB 391 @ 400 ... None of the above features appears in the statement of claim in the present action. (Emphasis added.)

[100] *It would be fair to say that this is a case where the Plaintiff's claim for negligence is so deficient of details and particulars as to make it defective.* One cannot help getting the impression that the Plaintiff was scrapping the barrel to find some cause of

A action should its claim in contract fails and this simply would not do. (Emphasis added.)

B [42] Based on the fact that the existence of a duty of care had not been sufficiently pleaded by the plaintiff, the court finds that the plaintiff had failed to establish a cause of action by the plaintiff against the defendant. The court therefore holds that this is a plain and obvious case for the claim to be struck out pursuant to O 18 r 19(1) of the Rules of Court 2012.

C [43] Notwithstanding this finding of the court, which in itself is sufficient to dispose of the striking out application in favour of the defendant, there are two further submissions raised by parties, which will be considered. The first is the defendant's submission that absent any other special relationship, the judicial manager owes no general duty of care to the unsecured creditors of the company in relation to his conduct in the judicial management (see *Kyrris v Oldham and others*; *Royle v Oldham and others* [2003] EWCA Civ 1506). I see no reason why the position would be any different in this case, under the judicial management regime under CA 2016.

E [44] The second is the submission of the plaintiff that the defendant had failed to carry out due inquiry in relation to the third-party signatory of the bank account. The plaintiff claimed that this duty to inquire arises under s 429 of the CA 2016.

F [45] Section 429 provides as follows:
(1) *The Court may, on the application of the judicial manager, summon to appear before it —*

- G (a) any officer of the company;
- (b) any person known or suspected to have in his possession any property of the company;
- (c) any person who is supposed to be indebted to the company; or
- H (d) any person whom the Court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company,

I and the Court may require any such person referred to in paragraphs (a) to (d) to submit an affidavit to the Court containing an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (d).

[46] The court finds the plaintiff's interpretation of s 429 of the CA 2016 to be misconceived. Section 429 does not impose a duty on the judicial manager

to inquire into the company's dealings. It is a provision that empowers the court, on the application of the judicial manager, to summon a person to court to submit an affidavit or to be examined under oath. Section 429 of the CA 2016 cannot be read to impose a positive duty or obligation on the defendant as a judicial manager to apply to the court for an inquiry.

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DECISION

[47] Upon considering the grounds raised by the defendant in the striking out application, the court finds that:

C

- (a) as the plaintiff had not obtained leave to file this action against the defendant;
- (b) as the defendant had disclaimed personal liability under s 416(2) of the CA 2016;
- (c) as there is no trust arrangement to form the basis of the defendant's alleged breach of constructive trust; and
- (d) as the plaintiff had failed to establish that the defendant owes a duty of care to the plaintiff and is in breach of the duty of care,

D

E

the plaintiff's claim against the defendant is on the face of it obviously unsustainable. The action against the defendant, as an officer of the court is also scandalous, frivolous or vexatious, amounting to an abuse of the process of the court.

F

[48] Any claim for amounts outstanding should be brought under the judicial management procedures in the CA 2016. The plaintiff has filed its proof of debt in accordance with the procedures under the CA 2016, so it is difficult to understand why this deviation from the statutory process of judicial management is necessary. The statutory process has been put in place to meet the objective of rehabilitating companies in financial distress. It is thus essential for the statutory process to be followed through, to ensure that this objective can be met.

G

H

[49] Enclosure 5 is allowed. The court awards costs of RM58,594.68 on an indemnity basis to the defendant.

Striking out application allowed.

I

Reported by Nabilah Syahida Abdullah Salleh